

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

RAYMOND LANE,  
SS# 430-68-6368

Plaintiff,

v.

SHIRLEY S. CHATER,  
Commissioner of the Social  
Security Administration,

Defendant.

NO. 94-C-429-M

**FILED**

DEC 27 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**ORDER**

ENTERED ON E-DOCKET  
DATE DEC 28 1995

On September 7, 1995, the Court remanded this case for an immediate award of benefits. Plaintiff has now applied for an award of attorney's fees pursuant to the Equal Access to Justice Act ("EAJA") 28 U.S.C. § 2412(d) [Dkt. 13] and also under 42 U.S.C. § 406(B)(1) [Dkt.12].

**ATTORNEY FEES UNDER EAJA**

The EAJA requires the United States to pay attorney fees and costs to a "prevailing party" unless the court finds the position of the United States was substantially justified, or special circumstances make an award unjust. 28 U.S.C. § 2412(d). The United States bears the burden of proving that its position was substantially justified. *Kemp v. Bowen*, 822 F.2d 966, 967 (10th Cir. 1987).

In *Pierce v. Underwood*, 487 U.S. 552, 565 (1988), the Supreme Court defined "substantially justified" as "justified in substance or in the main--that is, justified to a degree that could satisfy a reasonable person." "Substantially justified" is more than "merely undeserving of sanctions for frivolousness." *Id.*

[A] position can be justified even though it is not correct, and . . . it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.

*Id.* at n.2.

The Tenth Circuit has held that "a lack of substantial evidence on the merits does not necessarily mean that the government's position was not substantially justified." *Hadden v. Bowen*, 851 F.2d 1266, 1267 (10th Cir. 1988). The government must establish three components to meet the test of reasonableness: a reasonable basis for the facts asserted; a reasonable basis in law for the legal theory proposed; and support for the legal theory by the facts alleged. *Harris v. Railroad Retirement Board*, 990 F.2d 519, 520-1 (10th Cir. 1993).

While there was no direct evidence that plaintiff was literate, there was information from which an inference could be drawn that he could read. First, Plaintiff completed the sixth grade. Secondly, Dr. Williams' report noted, not that Plaintiff was illiterate, but that "he cannot read any type of technical manuals with the amount of education he has. He also believes that he could not study or learn from a text book because of his poor reading skills at this time." [R. 125]. Thus, there was at least some basis for the facts asserted by the government. As well, there was a reasonable basis in the law for the legal theory proposed and support for the legal theory in the facts. (i.e. application of the grid rule directing a finding of not disabled). Despite the order remanding the case for an immediate award of benefits, the Court finds that the government's position was substantially justified. Therefore, Plaintiff's application for fees under EAJA is DENIED.

### APPLICATION FOR FEES UNDER 42 U.S.C. § 406(d)

According to 42 U.S.C § 406(d), when a court renders a judgment favorable to a claimant who was represented before the court by an attorney, it may "determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." The fee is paid out of, and not in addition to the amount of past due benefits. The Defendant's only objection to Plaintiff's motion, is that the 11.85 hours of attorney services include 1 hour for preparation of the fee application, which is not chargeable to one's client. *Whitt v. Califano*, 601 F.2d 160, 161 n.2 (4th Cir. 1979). The Court notes that the application also includes 1.5 hours for drafting the EAJA fee application, which similarly should not be charged to the client. Subtracting 2.5 hours from the 11.85 requested results in 9.35 hours at \$150 per hour, for an award under 42 U.S.C. § 406(d) of \$1,402.50 or 25% of the past-due benefits, whichever is less.

Pursuant to 42 U.S.C. § 406(d), the Court determines that a reasonable fee for representation of Plaintiff before the district court is \$1,402.50 or 25% of the past-due benefits, whichever is less to be paid out of the past-due benefits. In accordance with *E.L. Harris v. Sec. of Health and Human Services*, 836 F.2d 496 (10th Cir. 1987) the award is only for services rendered at the judicial level.

### CONCLUSION

Plaintiff's MOTION FOR ATTORNEY'S FEES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT [Dkt. 13] is DENIED. Plaintiff's MOTION FOR ATTORNEY'S FEES PURSUANT TO THE SOCIAL SECURITY ACT [Dkt. 12] is GRANTED IN PART. The Court determines that \$1,402.50, or

25% of past-due benefits, whichever is less, is a reasonable fee for representation of Plaintiff at the judicial level. In accordance with Fed.R.Civ.P. Rule 58, the Court Clerk is directed to forthwith prepare, sign and enter judgement in conformity with this order.

SO ORDERED this 27<sup>th</sup> day of December, 1995.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEC 27 1995

DOLLAR SYSTEMS, INC.,  
a Delaware corporation,  
  
Plaintiff,

v.  
PACIFIC INTERNATIONAL  
SERVICES CORP.,  
a California corporation  
  
Defendant.

Case No. 95-C-488-B

ENTERED ON DOCKET

DATE DEC 28 1995

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the parties and, pursuant to Fed.R.Civ.P. 41, hereby stipulate to the dismissal of this action in its entirety with prejudice, each party to bear its respective costs, expenses and attorney's fees.

Dated this 27<sup>th</sup> day of December, 1995.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE,  
GOLDEN & NELSON, P.C.

By: Claire V Eagan  
Claire V. Eagan, OBA #554  
320 S. Boston Ave., Suite 400  
Tulsa, Oklahoma 74103-3708  
(918) 594-0400

ATTORNEYS FOR DOLLAR SYSTEMS, INC.

and

DOERNER, SAUNDERS, DANIEL & ANDERSON

By: Richard P. Hix  
Richard P. Hix, OBA #4241  
320 S. Boston Ave., Suite 500  
Tulsa, Oklahoma 74103  
(918) 582-1211

ATTORNEYS FOR PACIFIC INTERNATIONAL  
SERVICES CORP.

## FILE

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

) ) ) ) ) ) ) ) ) )

DATE DEC 28 1995

*[Handwritten signature]*

ATFB

THOMAS F. BIRMINGHAM OBA #811  
DAVID L. WEATHERFORD OBA #9409  
Birmingham, Morley, Weatherford &  
Priore  
1141 East 37th Street  
Tulsa, Oklahoma 74105-3162  
(918) 743-8355  
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

OTIS W. CRANE,

Plaintiff,

vs.

SHIRLEY S. CHATER,  
Commissioner of Social  
Security,

Defendant.

Case No. 94-C-651-B ✓

ENTERED ON DOCKET

DATE DEC 28 1995

**FILED**

DEC 27 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

O R D E R

Before the Court for consideration are the objections of the Plaintiff, Otis W. Crane, to the Magistrate Judge's Report and Recommendation ("R & R") to affirm the Administrative Law Judge's ("ALJ") denial of Social Security disability benefits.

Plaintiff filed applications for Social Security Disability Benefits and Supplemental Security Income benefits (hereinafter "benefits") with the Defendant in 1990 and 1991. The Plaintiff's claims were denied initially and on Reconsideration. After an Administrative hearing the ALJ issued a Denial Decision on October 5, 1993.

The Appeals Council denied the Plaintiff's Request for Review on May 2, 1994.

The Plaintiff filed this action on June 29, 1994, pursuant to 42 U.S.C. §405(g), seeking judicial review of the administrative decision to deny benefits under the Social Security Act. This matter was referred to the Magistrate Judge, who entered his R & R on October 18, 1995, recommending that the denial of benefits be

9



affirmed.

The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." Id. §423(d)(1)(A). An individual

"shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."

Id. § 423(d)(2)(A).

The findings of the Secretary, acting through the ALJ, stand if such findings are supported by substantial evidence, considering the record as a whole. Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Campbell v. Bowen, 822 F.2d at 1521; Brown v. Bowen, 801 F.2d 361 (10th Cir. 1986), Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir.1993).

The findings of the Secretary as to any fact are conclusive if supported by substantial evidence. 42 U.S.C. §405(g). It is not

the duty of this Court to reweigh the evidence or substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health & Human Services, 933 F.2d 799, 800 (10th Cir. 1991); Musgrave v. Sullivan, 966 F.2d 1371 (10th Cir.1992).

Determining the credibility of the witnesses and the evidence is solely the province of the ALJ. Williams v. Bowen, 844 F.2d 748, 755 (10th Cir. 1988). The ALJ can decide to believe all or any portion of any witness's testimony or evidence.

Plaintiff complains that the ALJ: (1) failed to properly consider the limiting effects of Mr. Crane's obesity in combination with his other impairments, and (2) failed to point out specific evidence that Plaintiff retains the residual functional capacity (RFC) to perform the full range of light work.

As to Plaintiff's first complaint above, the Court notes the following from the ALJ's decision, at page 40:

"The Administrative Law Judge notes that Dr. Dandridge's findings and evaluation are similar to those prepared by the Disability Determination Unit staff physicians. These are physicians hired by the state agency to review the documentary evidence of record and to form an opinion concerning claimant's remaining ability to perform work. These findings are shown in Exhibit 28. The opinions of these doctors are not binding upon the Administrative Law Judge. However, they do contain expert medical opinion and will be given probative value as such.

In the instance(sic) case, these physicians have found claimant able to lift and carry up to 20 pounds. They find claimant capable of standing and walking, with normal breaks, for a total of 6 hours in an 8-hour workday. They note claimant has the same ability to sit. They find claimant's ability to operate hand and foot controls to be unlimited other than for weight restrictions and lift and carry. In reaching this conclusion, they note claimant's degenerative joint

disease in the right ankle and prior arthrotomies. They also note the presence of or occurrence of infection. The claimant's complaints of knee pain have been properly noted, as have the electrodiagnostic techniques taken. They note claimant's slow gait involving the limp. They also note that examinations have indicated claimant's knees have a full range of motion without crepitation or fluid retention. They note claimant's weight and height. These findings are similar to those found by both Dr. Crowder, and Dr. Dandridge." Id. at 40-41.

Plaintiff argues that "the ALJ committed reversible error in failing to properly consider his obesity as a factor in combination with his impairments to several weight-bearing joints contributing to his disability." The Court disagrees. The record, including the above quoted portion of the ALJ's decision, demonstrates sufficient discussion and comment upon Plaintiff's obesity *viz-a-viz* his other impairments. The Court is of the view that substantial evidence exists in the record to support the ALJ's conclusions on this issue.

As to Plaintiff's second complaint, that the ALJ failed to point out specific evidence that Plaintiff retains the RFC to perform the full range of light work, the Court notes that the ALJ stated in his decision that in fact Plaintiff could not perform the full range of light work or exertional activities. At pages 46 and 48 of the decision the following appears:

"Regulations 20 CFR 404.1569 and 416.969, together with section 200.00 of Appendix 2, Subpart P, Regulations No. 4 and 16, provide a basis for determining the claimant's capacity for other work. This capacity is determined in view of the claimant's age, education, relevant work experience, and established residual functional capacity. Based on a residual functional capacity for the full range of light work and the claimant's age, education, and work experience, section 404.1569 and 416.969 of Regulations No. 4 and 16, and Rule 202.20, of Table No.

2, Appendix 2, Subpart P, Regulations 4 and 16, directs a conclusion of "not disabled." Claimant cannot perform the full range of light exertional activity. Therefore, presumptive reliance upon the grid rules is not appropriate." Id. at 46 (emphasis by the Court)

"Although the claimant's exertional limitations do not allow him to perform the full range of light work, using the above-cited rules as a framework for decisionmaking, there are a significant number of jobs in the national economy which the(sic) he could perform. Examples of such jobs are: hand packer, 98,000; toll booth attendant, 8,000; security guard, 326,000; parking lot attendant, 46,000; bench assembly, 144,000; escort driver, 122,000; car wash attendant, 54,000; and self-service gasoline attendant, 39,000." Id. at 48 (Emphasis by the Court)

Plaintiff argues that, having reached Step Five of the decisional process<sup>1</sup>, the burden is on the defendant to point to specific evidence that, considering his age, education, and skills, Mr. Crane could perform work which was available in significant numbers in the nation economy. The Court concludes the above quote from page 48, substantiated by vocational expert A. Glen Marlowe, adequately satisfies such burden.

Plaintiff also argues, in conjunction with his second complaint, that the ALJ "must point to substantial evidence that Mr. Crane can stand/walk for 6 hours of an 8 hour workday." The Court's quotation from the record at 40 adequately answers this argument.

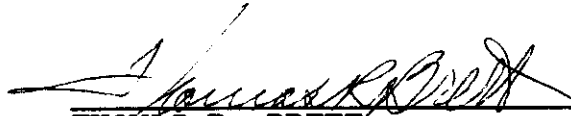
The Court concludes the Magistrate Judge's Report and Recommendation should be and the same is herewith affirmed and adopted. Plaintiff's objections thereto are overruled. The

---

<sup>1</sup> See, Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps are set forth in Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

Secretary's decision is, therefore, AFFIRMED.

IT IS SO ORDERED THIS 26<sup>th</sup> DAY OF DECEMBER, 1995.

  
\_\_\_\_\_  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

FILED

DEC 26 1995

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TEDDY L. WILSON,

Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner,  
Social Security Administration,

Defendant.

Case No. 94-C-659-B

ENTERED ON DOCKET

DATE DEC 27 1995

O R D E R

Before the Court is the objection of the Plaintiff, Teddy L. Wilson (Docket #11), to the Report and Recommendation of the United States Magistrate Judge, which affirmed the Secretary's denial of disability benefits.

Wilson was self-employed as the owner-operator of a hot dog stand from 1974 until 1983. He then worked as a city bus driver from 1984 until 1989, but lost the job because of poor vision in his left eye, which was caused by retinal scarring. Doctors believe that the damage to his eye is permanent.

Wilson was 60 years old when he first applied for disability benefits in 1990. After exhausting his administrative remedies, he appealed the Secretary's denial of benefits to this district, in Case No. 91-C-348-C. The Administrative Law Judge ("ALJ") had concluded that Wilson "is able to return to his past relevant work as the owner/operator of a hot dog restaurant". The Court remanded to the Secretary for a determination of whether Wilson's financial status allowed him to return to his past relevant work as an owner

13

of a hot dog restaurant,<sup>1</sup> and for clarification of the ALJ's statement: whether the ALJ meant that Wilson could return to his past relevant work as either an owner or an operator, or whether Wilson could return as an owner and operator. Upon remand, the ALJ again denied benefits. Wilson again exhausted his administrative remedies and appealed the final denial of disability benefits to this Court on June 30, 1994.

The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." *Id.* § 423(d)(1)(A). An individual

shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

*Id.* § 423(d)(2)(A).

Under the Social Security Act, the claimant bears the burden of proving a disability, as defined by the Act, which prevents him

---

<sup>1</sup>This Court notes that neither side briefed the issue of whether financial status should be considered by the ALJ when determining whether a claimant may return to his past relevant work.

from engaging in his prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once the claimant has established such a disability, the burden shifts to the Secretary to show that the claimant retains the ability to do other work activity and that jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544-45 (10th Cir. 1987).

The Secretary meets this burden if the decision is supported by substantial evidence. See, Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Campbell v. Bowen, 822 F.2d at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

is not merely a quantitative exercise. Evidence is not substantial 'if it is overwhelmed by other evidence--particularly certain types of evidence (e.g., that offered by treating physicians)--or if it really constitutes not evidence but mere conclusion.'

Fulton v. Heckler, 760 F.2d 1052, 1055 (10th Cir. 1985) (quoting Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985)). Thus, if the claimant establishes a disability, the Secretary's denial of disability benefits, based on the claimant's ability to do other work activity for which jobs exist in the national economy, must be



supported by substantial evidence.

The Secretary has established a five-step process for evaluating a disability claim. See Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes v. Bowen, 845 F.2d at 243, proceed as follows:

- (1) A person who is working is not disabled. 20 C.F.R. § 416.920(b).
- (2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).
- (3) A person whose impairment meets or equals one of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1, is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).
- (4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).
- (5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

If at any point in the process the Secretary finds that a person is disabled or not disabled, the review ends. Reyes, 845 F.2d at 243; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. § 416.920.

The ALJ found at Step Four of the analysis that Wilson is capable of returning to his past relevant work. Upon remand, the ALJ clarified that he believes Wilson is capable of returning to work both as an owner of a hot dog stand and as a operator of a hot

dog stand. The Magistrate Judge recommends that the Court affirm denial of Wilson's claim.

Wilson objects to the Magistrate Judge's Report and Recommendation on two grounds: that the ALJ failed to properly consider the impact of Wilson's financial situation on his ability to perform his past relevant work, and that the ALJ failed to consider the availability of Wilson's past relevant work.

The first question before the Court is whether evaluation of a claimant financial situation is required when determining whether the claimant may return to past relevant work. The Court concludes that such evaluation is unnecessary. The Rules and Regulations that set out factors to be considered in determining residual functional capacity ("RFP") do not mention financial resources; the evaluation is one of physical capabilities alone. See 20 CFR 404.1561, 416.961. The Eleventh Circuit Court of Appeals, in determining whether a former owner-operator of a service station could return to such past relevant work, stated that:

[t]he determination of whether [claimant] can return to his past relevant work cannot be dependent on [claimant's] capacity to raise capital to purchase a service station, and our use of the term "owner-operator" is not intended to imply otherwise. Rather, the proper inquiry is whether [claimant] can perform the physical duties and responsibilities of an owner-operator of a service station.

Schnorr v. Bowen, 816 F.2d 578, 581 n.4 (11th Cir. 1987). While the Tenth Circuit Court of Appeals has not directly addressed this issue, other courts have not considered financial resources when


considering whether the owner/operator of a business has the RFP to return to his past relevant work. See, e.g., Limberepoulos v. Shalala, 17 F.3d 975 (7th Cir. 1994) (owner-operator of a produce market); Dupuis v. Secretary, 869 F.2d 622 (1st Cir. 1989) (owner-operator of a metal finishing business); and Smith v. Heckler, 782 F.2d 1176 (4th Cir. 1986) (owner-operator of an appliance store).

Therefore, the Court concludes that Wilson's finances are irrelevant to the issue of whether he is physically able to perform his past relevant work of a hot dog stand owner or operator. As Wilson did not object to the Magistrate Judge's Report and Recommendation that Wilson is physically able to perform the duties of his past relevant work, the Court hereby adopts and affirms the Report and Recommendation as to this issue.

Wilson next objects to the Report and Recommendation on the issue of the ALJ's alleged failure to consider the availability of Wilson's past relevant work. However, as noted by the Magistrate Judge, availability of past relevant work is not a consideration at Step Four of the analysis. Rather, a claimant can be found to be not disabled at Step Four even though the former job is no longer available. Jozefowicz v. Hecker, 811 F.2d 1352, 1356 (10th Cir. 1987). The proper inquiry is whether a claimant can perform the type of job he or she previously performed. Tillery v. Schweiker, 713 F.2d 601, 602 (10th Cir. 1983). There is substantial evidence in the record to support the ALJ's conclusion that Wilson can perform his past relevant work as either a owner or as a operator of a fast food stand.

The Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge that Wilson's claim be denied.

IT IS SO ORDERED this 26<sup>th</sup> day of December, 1995.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

FILED

DEC 26 1995

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

TEDDY L. WILSON,

Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner,  
Social Security Administration,

Defendant.

Case No. 94-C-659-B

ENTERED ON DOCKET

DATE DEC 27 1995

O R D E R

Before the Court is the objection of the Plaintiff, Teddy L. Wilson (Docket #11), to the Report and Recommendation of the United States Magistrate Judge, which affirmed the Secretary's denial of disability benefits.

Wilson was self-employed as the owner-operator of a hot dog stand from 1974 until 1983. He then worked as a city bus driver from 1984 until 1989, but lost the job because of poor vision in his left eye, which was caused by retinal scarring. Doctors believe that the damage to his eye is permanent.

Wilson was 60 years old when he first applied for disability benefits in 1990. After exhausting his administrative remedies, he appealed the Secretary's denial of benefits to this district, in Case No. 91-C-348-C. The Administrative Law Judge ("ALJ") had concluded that Wilson "is able to return to his past relevant work as the owner/operator of a hot dog restaurant". The Court remanded to the Secretary for a determination of whether Wilson's financial status allowed him to return to his past relevant work as an owner

of a hot dog restaurant,<sup>1</sup> and for clarification of the ALJ's statement: whether the ALJ meant that Wilson could return to his past relevant work as either an owner or an operator, or whether Wilson could return as an owner and operator. Upon remand, the ALJ again denied benefits. Wilson again exhausted his administrative remedies and appealed the final denial of disability benefits to this Court on June 30, 1994.

The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." *Id.* § 423(d)(1)(A). An individual

shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

*Id.* § 423(d)(2)(A).

Under the Social Security Act, the claimant bears the burden of proving a disability, as defined by the Act, which prevents him

---

<sup>1</sup>This Court notes that neither side briefed the issue of whether financial status should be considered by the ALJ when determining whether a claimant may return to his past relevant work.

from engaging in his prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once the claimant has established such a disability, the burden shifts to the Secretary to show that the claimant retains the ability to do other work activity and that jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544-45 (10th Cir. 1987).

The Secretary meets this burden if the decision is supported by substantial evidence. See, Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Campbell v. Bowen, 822 F.2d at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

is not merely a quantitative exercise. Evidence is not substantial 'if it is overwhelmed by other evidence--particularly certain types of evidence (e.g., that offered by treating physicians)--or if it really constitutes not evidence but mere conclusion.'

Fulton v. Heckler, 760 F.2d 1052, 1055 (10th Cir. 1985) (quoting Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985)). Thus, if the claimant establishes a disability, the Secretary's denial of disability benefits, based on the claimant's ability to do other work activity for which jobs exist in the national economy, must be

supported by substantial evidence.

The Secretary has established a five-step process for evaluating a disability claim. See Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes v. Bowen, 845 F.2d at 243, proceed as follows:

- (1) A person who is working is not disabled. 20 C.F.R. § 416.920(b).
- (2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).
- (3) A person whose impairment meets or equals one of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1, is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).
- (4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).
- (5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

If at any point in the process the Secretary finds that a person is disabled or not disabled, the review ends. Reyes, 845 F.2d at 243; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. § 416.920.

The ALJ found at Step Four of the analysis that Wilson is capable of returning to his past relevant work. Upon remand, the ALJ clarified that he believes Wilson is capable of returning to work both as an owner of a hot dog stand and as a operator of a hot



dog stand. The Magistrate Judge recommends that the Court affirm denial of Wilson's claim.

Wilson objects to the Magistrate Judge's Report and Recommendation on two grounds: that the ALJ failed to properly consider the impact of Wilson's financial situation on his ability to perform his past relevant work, and that the ALJ failed to consider the availability of Wilson's past relevant work.

The first question before the Court is whether evaluation of a claimant financial situation is required when determining whether the claimant may return to past relevant work. The Court concludes that such evaluation is unnecessary. The Rules and Regulations that set out factors to be considered in determining residual functional capacity ("RFP") do not mention financial resources; the evaluation is one of physical capabilities alone. See 20 CFR 404.1561, 416.961. The Eleventh Circuit Court of Appeals, in determining whether a former owner-operator of a service station could return to such past relevant work, stated that:

[t]he determination of whether [claimant] can return to his past relevant work cannot be dependent on [claimant's] capacity to raise capital to purchase a service station, and our use of the term "owner-operator" is not intended to imply otherwise. Rather, the proper inquiry is whether [claimant] can perform the physical duties and responsibilities of an owner-operator of a service station.

Schnorr v. Bowen, 816 F.2d 578, 581 n.4 (11th Cir. 1987). While the Tenth Circuit Court of Appeals has not directly addressed this issue, other courts have not considered financial resources when

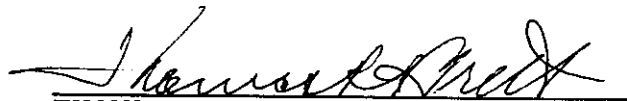
considering whether the owner/operator of a business has the RFP to return to his past relevant work. See, e.g., Limberopoulos v. Shalala, 17 F.3d 975 (7th Cir. 1994) (owner-operator of a produce market); Dupuis v. Secretary, 869 F.2d 622 (1st Cir. 1989) (owner-operator of a metal finishing business); and Smith v. Heckler, 782 F.2d 1176 (4th Cir. 1986) (owner-operator of an appliance store).

Therefore, the Court concludes that Wilson's finances are irrelevant to the issue of whether he is physically able to perform his past relevant work of a hot dog stand owner or operator. As Wilson did not object to the Magistrate Judge's Report and Recommendation that Wilson is physically able to perform the duties of his past relevant work, the Court hereby adopts and affirms the Report and Recommendation as to this issue.

Wilson next objects to the Report and Recommendation on the issue of the ALJ's alleged failure to consider the availability of Wilson's past relevant work. However, as noted by the Magistrate Judge, availability of past relevant work is not a consideration at Step Four of the analysis. Rather, a claimant can be found to be not disabled at Step Four even though the former job is no longer available. Jozefowicz v. Hecker, 811 F.2d 1352, 1356 (10th Cir. 1987). The proper inquiry is whether a claimant can perform the type of job he or she previously performed. Tillery v. Schweiker, 713 F.2d 601, 602 (10th Cir. 1983). There is substantial evidence in the record to support the ALJ's conclusion that Wilson can perform his past relevant work as either a owner or as a operator of a fast food stand.

The Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge that Wilson's claim be denied.

IT IS SO ORDERED this 26<sup>th</sup> day of December, 1995.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

DEC 26 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

MERRELL HARRIS

Plaintiff,

v.

DELTA AIRLINES, INC. a  
Delaware Corporation,

Defendant.

Case No. 94-C 1186B

ENTERED ON DOCKET

DATE DEC 27 1995

**STIPULATION FOR DISMISSAL WITH PREJUDICE**

COME NOW the attorneys for the plaintiff, MERRILL HARRIS, and for the defendant, DELTA AIR LINES, INC. and hereby stipulate and agree that the above-captioned case may be dismissed with prejudice to further litigation pertaining to all matters involved herein and state to the Court that this matter is resolved between the parties covering all claims involved in this lawsuit and therefore, the parties request that this Court dismiss the action with prejudice.



David M. Garrett  
Timothy R. Haney  
DAVID GARRETT LAW OFFICE, P.C.  
215 State Street, 10th Floor  
P.O. Box 2969  
Muskogee, OK 74401  
(918) 683-3288  
**ATTORNEYS FOR PLAINTIFF  
MERRELL HARRIS**



Burton J. Johnson  
Bradley K. Donnell  
LOONEY, NICHOLS, JOHNSON & HAYES  
528 N.W. 12th Street  
Oklahoma City, OK 73103  
(405) 235-7641  
**ATTORNEYS FOR DEFENDANTS  
NORDYNE, INC.**

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

LINDA Y. DAVENPORT,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner,  
Social Security Administration,

Defendant.

Civil Action No. 95-C-759-W

EDD → DEC 27 1995  
Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

ORDER

On November 16, 1995, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded to the Commissioner for an award of benefits. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney under the EAJA, 28 U.S.C. §2412(d), filed on December 14, 1995, the parties have stipulated that an award in the amount of \$1,476.00 for attorney fees and expenses for all work done before the district court is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney's fees and expenses under the Equal Access To Justice Act in the amount of \$1,476.00. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 27<sup>th</sup> day of December 1995.

  
JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

14

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 22 1995

BILLY J. WILLIAMS,  
SS# 440-28-6870

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner,<sup>1</sup>  
Social Security Administration

Defendant.

NO. 94-C-827-K ✓

Edward M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

ENTERED ON E-DOCKET  
DATE DEC 26 1995

REPORT AND RECOMMENDATION

Plaintiff, Billy J. Williams, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits. Plaintiff's application for benefits was filed March 16, 1989 and denied June 9, 1989. The denial was affirmed on reconsideration, July 31, 1989. A hearing before an Administrative Law Judge ("ALJ") was held April 17, 1990, a denial decision was issued May 31, 1990. The Appeals Council affirmed the findings of the ALJ on March 21, 1991. Plaintiff appealed to the district court. On the motion of the Secretary, the matter was remanded for further development of the record.<sup>2</sup> On remand, a hearing was held March 17, 1993. On September 8, 1993 the ALJ issued the denial decision that is the subject of this appeal. The denial was affirmed by the Appeals Council July 15, 1994. The decision of the Appeals Council represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

<sup>1</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. However, this report continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

<sup>2</sup> Plaintiff inaccurately suggests that the court has already reversed the Secretary's decision once. The record is clear, however, that the matter was remanded on the motion of the Secretary, and not as a result of a review on the merits. [See R. 283].

The role of the court in reviewing the decision of the Secretary under 42 USC § 405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales*, 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

The undersigned United States Magistrate Judge finds that the ALJ has adequately and correctly set forth both the relevant facts of this case and has properly outlined the required sequential analysis. The Court therefore incorporates this information into this recommendation as the duplication of this effort would serve no useful purpose.

Plaintiff last worked in 1974, yet he alleges physical inability to work due to an impairment of his left shoulder, following surgical repair of a rotator cuff injury in 1988. The ALJ found that Plaintiff was capable of performing the full range of medium work<sup>3</sup>, except for work requiring overhead reaching. Plaintiff alleges this finding is not supported by substantial evidence. Plaintiff points out that, given his age (61, at the time of the hearing), his education

---

<sup>3</sup> Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. 20 CFR §404.1567(d).

level (high school) and lack of transferable skills, according to the Vocational-Medical Guidelines ("Grids"), a finding that he could perform only at the light exertional level would require a finding of disability, whereas if Plaintiff can perform medium work the Grids direct a finding of not disabled. 20 C.F.R. Pt. 404, Subpt. P, App. 2, Rules 202.04, 203.06. Therefore, if the ALJ's finding concerning Plaintiff's residual functional capacity for medium work is erroneous, the matter should be remanded for an immediate award of benefits.

The ALJ's finding concerning Plaintiff's residual functional capacity for medium work is supported by substantial evidence. Consulting physician, Dr. E. Joseph Sutton, II, examined Plaintiff on December 29, 1992 [R. 381-388]. Dr. Sutton found Plaintiff to have a frozen left shoulder, post surgery for rotator cuff tear [R. 382]. He made the following findings concerning Plaintiff's residual functional capacity:

This patient should be able to sit, stand, and walk a total of eight hours at one time, or sit, stand, and walk a total of eight hours during an entire eight hour day. The patient does not allege any disability with any of these activities and should be able to perform anything commensurate with his physical size, stature, etc. He should be able to lift or carry any weight commensurate with his size. If the patient had to lift any weight about [sic] his head, he would not be able to use his left arm because of the restriction in his shoulder. The patient, however, has quite normal upper extremity strength and would not have any difficulty lifting any weight to at least waist high.

\* \* \*

The only restriction would be that his reaching would have to be below about shoulder height because that is about as high as he is able to raise his left arm. He would be able to reach in front of him or off to the side without any difficulty. [R. 382-3].

Plaintiff does not dispute the findings in Dr. Sutton's report. The Court finds Dr. Sutton's report to be consistent with the other medical records and Plaintiff's testimony [R. 299, 309-10].

Plaintiff argues that the ALJ's questioning of the vocational expert is faulty because the



hypothetical to the vocational expert failed to include the limitation contained in Dr. Sutton's report that Plaintiff could not lift above the waist. In posing a hypothetical question, an ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). Contrary to Plaintiff's assertion, Dr. Sutton did not say that Plaintiff was unable to lift any weight beyond waist high. What Dr. Sutton said, was that Plaintiff "would not have any difficulty lifting any weight to *at least* waist high." The only restrictions Dr. Sutton placed on Plaintiff's abilities are: (1) the inability to use his left arm to lift weight above his head; and (2) reaching only to shoulder height. The hypothetical questioning took these limitations into account. Accordingly, the Court finds that the ALJ's conclusion based on the vocational expert's testimony is supported by substantial evidence.

The ALJ properly relied on the medical-vocational guidelines 20 C.F.R. Pt. 404, Subpt. P, App. 2. ("grids") as a framework for analysis. Rule 203.06 directs a finding of not disabled. Since Plaintiff's inability to reach overhead with his left arm narrows the range of possible work he can perform, the ALJ properly called a vocational expert to testify whether specific jobs appropriate to Plaintiff's limitations exist in the national economy. *Channel v. Heckler*, 747 F.2d 577, 581 (10th Cir. 1984). The ALJ's conclusion that Plaintiff is not disabled is supported by the vocational expert's testimony that jobs such as medium janitorial work and medium groundskeeping exist in significant numbers in the national and regional economy [R. 318].

The Court finds that the ALJ evaluated the record in accordance with the correct legal standards established by the Secretary and the courts. The Court finds that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the undersigned United

States Magistrate Judge recommends that the decision of the Secretary finding Plaintiff not disabled be AFFIRMED.

In accordance with 28 U.S.C. § 636(b) and Fed.R.Civ.P. 72(b), any objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of the receipt of this Report. Failure to file objections within the time specified waives the right to appeal from a judgment of the district court based upon the findings and recommendations of the Magistrate Judge. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED THIS 22<sup>nd</sup> day of Dec., 1995.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

DEC 22 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

ROBERT E. CAMERON,  
Plaintiff,

v.

Case No. 95-C-630-H ✓

SUPERIOR COURT OF THE STATE  
OF CALIFORNIA, COUNTY OF  
MARIN, CALIFORNIA,

Defendant.

ENTERED ON DOCKET

DATE 12-26-95

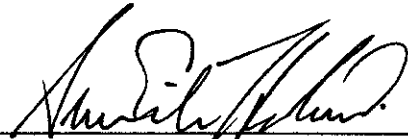
O R D E R

This Court entered an order on July 26, 1995, which noted that Plaintiff had failed to provide a summons for service on Defendant as required by Fed. R. Civ. P. 4. Because Plaintiff brings this matter pro se, the Court permitted Plaintiff the opportunity to remedy this defect and directed him to file such summons on or before August 18, 1995. The Court further noted that "[f]ailure to comply with this order shall result in the dismissal of Plaintiff's complaint."

Plaintiff failed to comply with the Court's order. Accordingly, his complaint is hereby dismissed.

IT IS SO ORDERED.

This 22<sup>ND</sup> day of December, 1995.

  
Sven Erik Holmes  
United States District Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

DEBORAH K. OLANDESE aka  
DEBORAH KATHRYAN REYNOLDS  
fka DEBORAH O. WILLIS aka  
DEBORAH KATHRYAN OLANDESE  
fka DEBORAH O. REYNOLDS;  
OKLAHOMA GAS & ELECTRIC CO.;  
CITY OF GLENPOOL, Oklahoma;  
COUNTY TREASURER, Tulsa County,  
Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

**FILED**

DEC 22 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

Civil Case No. 95-C 461H

ENTERED ON DOCKET

DATE 12-26-95

**ORDER**

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 22<sup>nd</sup> day of December, 1995.

S/ SVEN ERIK HOLMES

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:  
STEPHEN C. LEWIS  
United States Attorney

**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
333 W. 4th St., Ste. 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 22 1995

GLORIETTA I. WICKHAM,  
SSN: 448-34-8438,

Plaintiff,

v.

SHIRLEY S. CHATER,  
Commissioner of the Social  
Security Administration,<sup>1</sup>

Defendant.

NO. 93-C-925-H ✓

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE 12-26-95

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Defendant's Motion To Dismiss Plaintiff's Complaint [Dkt. 4] has been referred to the undersigned United States Magistrate Judge for Report and Recommendation. By this motion, the Secretary seeks to have Plaintiff's complaint dismissed on the basis that this Court lacks subject matter jurisdiction. Plaintiff's complaint appeals the Secretary's failure to reopen a 1989 claim for SSI benefits in conjunction with the administrative action taken on her 1992 claim for benefits. The Secretary responds that she has no record of a 1989 SSI claim by Plaintiff and asserts additional grounds which deny this Court subject matter jurisdiction.

In order to understand the Court's resolution of this jurisdictional issue, the factual background of Plaintiff's 1992 claim for SSI benefits is essential.

<sup>1</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services in Social Security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. However, this Report and Recommendation continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

## FACTUAL BACKGROUND

The following is a chronology of Plaintiff's 1992 claim for SSI benefits:

2/25/92	Plaintiff files an application for SSI benefits with a protective filing date of 2/25/92. This application does not contain a request to reopen any earlier application. [R. 67-70]
7/23/92	The Secretary denies the application for SSI benefits. [R. 71-73]
8/21/92	Plaintiff files a request for reconsideration. There is no request to reopen any earlier application. At this point, Plaintiff is represented by counsel. [R. 74]
9/03/92	The Secretary denies Plaintiff's application on reconsideration. [R. 76-78]
9/23/92	Plaintiff files a request for a hearing before an Administrative Law Judge. In this request, Plaintiff requests that her earlier SSD claim be reopened. [R. 79]
3/02/93	A hearing is held before an Administrative Law Judge. Plaintiff is represented by counsel and there is no mention of any request to reopen any earlier claim. [R. 36-64]
3/26/92	The Administrative Law Judge renders a decision which is completely favorable to Plaintiff as of the protective filing date of 2/25/92. [R. 13-18]
5/26/93	Plaintiff files a request for review of the hearing Decision/Order. This form reflects that Plaintiff is requesting a reopening of her 1989 SSI claim. [R. 5-6]
5/26/93	Plaintiff's attorney corresponds to the Appeals Council asserting "good cause exists to reopen the August 1989 application". [R. 7-8]
8/10/93	The Appeals Council denies Plaintiff's request to reopen the 1989 application stating as its reason that Plaintiff did not meet the insured status at that time, and was thus not entitled to SSD benefits. [R. 3]
10/14/93	Plaintiff files a complaint in this court alleging error in failing to reopen her 1989 application for benefits. This complaint does not specify whether Plaintiff asserts her 1989 application was for SSI benefits, SSD benefits, or both. [Dkt. 1]
1/14/94	The Secretary moves to dismiss Plaintiff's complaint asserting that this Court does not have subject matter jurisdiction to hear an appeal concerning the refusal to reopen Plaintiff's 1989 claim for SSD benefits. [Dkt. 4]

2/28/94	<p>Plaintiff files her opposition to the Secretary's Motion To Dismiss asserting that the complaint concerns the Secretary's failure to reopen her 1989 SSI application. Plaintiff asserts that the Court has subject matter jurisdiction due to constitutional violations and a de facto reopening by the Secretary. [Dkt. 12]</p> <p>Attached to Plaintiff's opposition is a January 4, 1990 SSI Denial Notice addressed to Plaintiff as proof of her 1989 claim for SSI benefits. Plaintiff states that she did not request reconsideration of the denial of her 1989 claim for SSI benefits.</p>
4/04/94	<p>The Secretary files a reply to Plaintiff's opposition, asserting that the Secretary has no record of any 1989 claim by Plaintiff for SSI benefits. [Dkt. 13]</p>
8/01/95	<p>In order to resolve the jurisdictional issue, the Court ordered the Secretary to produce the entire administrative record of Plaintiff's 1992 claim for SSI benefits. [Dkt. 17]</p>

The Court acknowledges the Secretary's assertion that she has no record of Plaintiff's 1989 claim for SSI benefits. However, based upon the January 4, 1990 SSI denial notice, for the purposes of resolving this motion only, the Court finds that Plaintiff did, in fact, file a claim for SSI benefits in 1989 which was denied by the Secretary on January 4, 1990. Further, based upon Plaintiff's statement, the Court finds that Plaintiff did not seek reconsideration of the January 4, 1990 denial of her claim for SSI benefits.

### MOTION TO DISMISS

Although not specifically set forth in Defendant's Motion To Dismiss, it is apparent to the Court that Defendant is moving for dismissal for lack of subject matter jurisdiction pursuant to F.R.C.P. 12(b)(1). Motions to dismiss under Rule 12(b)(1) are of two types. The first type consists of a facial attack on the sufficiency of the allegations of the complaint. In such an attack the court must accept the allegations in the complaint as true. The second type of attack challenges the facts upon which subject matter jurisdiction depends. In this second type of

attack, the court does not presume the truthfulness of the complaint's factual allegations. The court has wide discretion to allow affidavits, other documents and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1). The court's reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion. The court would be required to convert a Rule 12(b)(1) motion to dismiss into a Rule 12(b)(6) motion or a Rule 56 motion if resolution of the jurisdictional question is intertwined with the merits of the case. *Holt v. U.S.*, 46 F.3d 1000 (10th Cir. 1995).

In the case before this Court, Plaintiff is seeking review of the Secretary's decision not to reopen an earlier application for benefits. Generally, the Court does not have subject matter jurisdiction to review the Secretary's decision not to reopen a previous claim. *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). While Plaintiff agrees with this general principle, Plaintiff asserts there are exceptions to this general rule for constitutional claims and situations wherein the Secretary has "de facto" reopened the earlier application. Plaintiff further contends that these exceptions apply to this case.

To determine if this Court has subject matter jurisdiction based upon these exceptions, the Court must resolve the following jurisdictional facts: whether a constitutional due process violation occurred; and whether a de facto reopening occurred. Thus the factual determination necessary for resolution of the jurisdictional issue is not intertwined with the merits of the case and the Court may properly proceed under Rule 12(b)(1) and exercise its discretion to consider matters outside the pleadings to resolve those jurisdictional factual issues.

In this regard, the Court has considered various documents appended to the briefs relating to Plaintiff's prior application which the Secretary refused to reopen. Further, the Court has



considered the entire transcript of proceedings in Plaintiff's February, 1992 claim which resulted in the award of benefits by the Secretary.

### **REGULATIONS REGARDING REOPENING CLAIMS**

Although Plaintiff asserts that there was good cause for the Secretary to reopen her 1989 application for SSI benefits, the Secretary's regulations do not permit reopening of an SSI claim under the facts of this case. The regulations provide for reopening based upon good cause only within two years of the date of the initial determination on the prior application. 20 CFR §416.1488 (b); *Robinson v. Heckler*, 783 F.2d 1144 (4th Cir. 1986); *McGowen v. Harris*, 666 F.2d 60 (4th Cir. 1981). In this case, more than two years elapsed between the issuance of the January 4, 1990 denial and the February 25, 1992 protective filing date of Plaintiff's application for SSI benefits. Therefore, there can be no reopening for good cause under 20 CFR §416.1488(b). An exception to the two year limitation is provided for situations involving fraud or similar fault. 20 CFR §416.1488(c). However, Plaintiff has not made any such allegations.

### **PLAINTIFF'S ALLEGED CONSTITUTIONAL CLAIMS**

Plaintiff asserts a constitutional violation occurred because she did not receive a hearing on the merits of her 1989 application. However, Plaintiff fails to explain how this lack of hearing constitutes a constitutional violation. The Supplemental Security Income Notice Plaintiff attached to her opposition to the Secretary's motion to dismiss informed Plaintiff that she could seek reconsideration of the initial denial. She did not. Plaintiff, thus failed to meet the prerequisite for a hearing, 20 CFR §416.1430, and failed to request one. Plaintiff's failure to

receive a hearing she did not request does not constitute a colorable constitutional claim.<sup>2</sup>

Plaintiff also claims that she was deprived of due process because she was not represented by counsel. However, the Supplemental Security Income Notice advised Plaintiff of the possibility of obtaining free legal help, or assistance from the Social Security Administration. Plaintiff simply failed to avail herself of such help. The lack of representation by counsel does not present a colorable constitutional claim.<sup>3</sup>

Plaintiff claims administrative *res judicata* was applied to her case in such a way as to cause a violation of her constitutional rights. However, *res judicata* was not applied to this case. The record is clear that in processing Plaintiff's 1992 claim for SSI benefits, the Secretary never considered the effect of the denial of Plaintiff's 1989 SSI claim because the Secretary had no record of that claim.

#### DE FACTO REOPENING

The remaining issue is whether a de facto reopening occurred. It is well-established that a de facto reopening of a previous application is subject to judicial review. *Taylor for Peck v. Heckler*, 738 F.2d 1112, 1115 (10th Cir. 1984). A de facto reopening occurs when an ALJ considers the merits of a previous application and reappraises the evidence without deciding the administrative *res judicata* issue. *Taylor*, 738 F.2d at 1114. However, the previous application is not considered to be reopened if the ALJ merely reviews previously submitted evidence as

---

<sup>2</sup> A putative constitutional claim is not "colorable" if it "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial or frivolous," Koerpel v. Heckler, 797 F.2d 858, 863 (10th Cir. 1986), citing Boettcher v. Secretary of Health and Human Services, 759 F.2d 719, 722 (9th Cir. 1985).

<sup>3</sup> Plaintiff's vague assertion that the Supplemental Security Income Notice she received was constitutionally deficient and citation of cases finding fault with other and different notices does not present a colorable constitutional claim. The Court finds the notice in question constitutionally sufficient.

background information and does not reappraise the evidence. *Frustaglia v. Secretary of Health and Human Services*, 829 F.2d 192, 193 (1st Cir. 1987); *Burks-Marshall v. Shalala*, 7 F.3d 1346, 1348 (8th Cir. 1993). As the Eighth Circuit explained in *Burks-Marshall*, "[t]reating any admission of evidence from prior claims as a waiver of the [Commissioner's] power not to reopen, as the claimant apparently suggests, would not be in the best interest of claimants. Such a rule might cause Administrative Law Judges to resist the admission of evidence potentially advantageous to claimants." *Id.* at 1348.

The ALJ's decision does not mention Plaintiff's 1989 application. And, although some medical records pre-dating the 1989 application are included in the record, the ALJ's decision refers only to exhibits 16, 17, and 23 which include Plaintiff's medication list and medical records covering the period 12/6/90 to 6/30/92 [R. 134-148; 178]. There were no arguments presented to the ALJ at the hearing concerning any reopening of the previous application. There is nothing in the record to suggest that the ALJ was even aware of Plaintiff's 1989 claim for SSI benefits and certainly no sign that he reappraised the merits of that earlier application. Therefore, the Court finds that a de facto reopening did not occur.

Based upon the above analysis, the Court finds that Plaintiff's complaint does not arise within this Court's subject matter jurisdiction for review Social Security appeals. 42 U.S.C. § 405(g); *Califano v. Sanders*, *supra*.

The undersigned United States Magistrate Judge RECOMMENDS THAT PLAINTIFF'S COMPLAINT BE DISMISSED for lack of subject matter jurisdiction.

In accordance with 28 U.S.C. § 636(b) and Fed.R.Civ.P. 72(b), any objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of

the receipt of this Report. Failure to file objections within the time specified waives the right to appeal from a judgment of the district court based upon the findings and recommendations of the Magistrate Judge. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 22<sup>nd</sup> day of Dec., 1995.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

DEC 22 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

**MARTHA L. WARD,**

Plaintiff,

vs.

**BRYAN INSTITUTE, INC., d/b/a BRYAN  
INSTITUTE, a foreign corporation doing business  
in Oklahoma; HARRY W. DICKERSON; and  
ZYLPHIA R. DICKERSON,**

Defendants.

**Tulsa County District Court  
Case No. CJ-94-03535**

**Case No. 95-C-232B**

**ORDER OF DISMISSAL**

ENTERED ON DOCKET

DATE DEC 26 1995

Upon the Application of the Plaintiff, **MARTHA L. WARD**, and for good cause shown  
this action is hereby dismissed with prejudice.

S/ THOMAS R. BRETT

**UNITED STATES DISTRICT JUDGE**

**FILED**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF THE STATE OF OKLAHOMA

DEC 22 1995

OSAGE TAX COMMISSION,  
governmental agency of the  
Osage Nation

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

Plaintiff

No. 95-C-1190 B

vs.

THE UNITED STATES OF AMERICA,  
et al.,

ENTERED ON DOCKET

DATE DEC 26 1995

Defendants.

PRELIMINARY INJUNCTION

Upon the joint application of Plaintiff and the Federal Defendants, the Court hereby enters the following Preliminary Injunction:

Until further order of this Court, the Bureau of Indian Affairs, and the individual Federal Defendants shall not physically oppose or interfere in any lawful tax enforcement activity undertaken by Plaintiffs so long as such activities are not in violation of federal law or the failure to act would cause the Secretary of the Interior to breach any trust responsibility he may have to any party.


It is so ordered.

Dated this 22 day of December, 1995.

S/ THOMAS R. BRETT


\_\_\_\_\_  
Thomas Brett,  
Judge of the District Court

APPROVED:



---

Chadwick Smith, OBA #8312  
Attorney for the Osage Nation Tax Commission  
P. O. Box 9192  
Tulsa, Oklahoma 74157-0192  
(918) 446-4601



---

Phil Pinnell, OBA #7169  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103-3809  
(918) 581-7463

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 22 1995  
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

TOMMY CRAVENS,

Plaintiff,

vs.

AMKO SALVAGE CO., d/b/a AMKO  
SALES CO., INC., an Oklahoma  
corporation; and VICTOR CARY,  
an individual; and DAN  
CLINGINPEEL, an individual, and  
the Unnamed Personal Representative  
of the Estate of Ron Self,  
Deceased; and ALICE CARY,

Defendants.

Case No. 95-C-214-B

ENTERED ON DOCKET

DATE DEC 26 1995

O R D E R

Before the Court is Plaintiff Tommy Cravens' Motion to Dismiss with prejudice Defendant Alice Cary (Docket #36). Cary has no objection to the motion, but reserves the right to apply for costs under 28 U.S.C. § 1927 and attorney's fees. Therefore, the Court hereby dismisses this cause of action as to Alice Cary, and reserves the issues of costs and attorney's fees until such time as Cary timely applies for same.

This dismissal renders moot the following motions: Cary's Motion for Summary Judgment (Docket #14), Plaintiff's Motion to Change Response Time and to Conduct Discovery (Docket #16), Cary's Motion to Strike (Docket #21), Cary's second Motion to Strike (Docket #22), Cary's Motion for Hearing and to Deem Specific Motions Confessed (Docket #23), Cary's second Motion for Summary Judgment (Docket #24), Plaintiff's Motion to Dismiss without prejudice (Docket #27), Plaintiff's Motion for Expedited Hearing



regarding dismissing Cary without prejudice (Docket #31).

IT IS SO ORDERED this 22<sup>nd</sup> day of December, 1995.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett", written over a horizontal line.

THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

DEC 22 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

RICHARD EUGENE MICKEY,

Plaintiff,

vs.

STANLEY GLANZ,

Defendant.

No. 94-C-935-B

ENTERED ON DOCKET

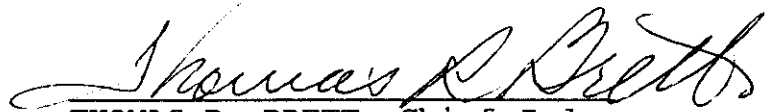
DATE DEC 26 1995

ORDER

On November 7, 1995, the Court granted Plaintiff a second extension of time to submit a motion for leave to amend and a proposed amended complaint. Plaintiff has failed to do so.

Accordingly, this action is hereby DISMISSED for lack of prosecution.

SO ORDERED THIS 21 day of Dec, 1995.

  
THOMAS R. BRETT, Chief Judge  
UNITED STATES DISTRICT COURT

24

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

DEANNE L. MEADOR, individually  
and on behalf of all others  
similarly situated,

Plaintiff,

vs.

RADER ADFAX, an unincorporated  
business association; CHRIS CAMPBELL,  
individually and d/b/a Rader Adfax;  
ALL AMERICAN FITNESS AND  
RACQUETBALL CENTERS,  
INCORPORATED, an Oklahoma  
Corporation; PARTIES PLUS, INC.,  
an Oklahoma corporation; MILLINDA'S  
GOLD MEDALLION,

Defendants.

ENTERED ON DOCKET  
DATE 12-22-95

Case No.: 95-C-785H

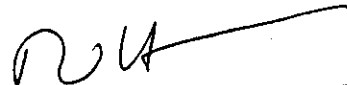
**F I L E D**

DEC 21 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE  
OF ALL CLAIMS AGAINST DEFENDANT ALL AMERICAN  
FITNESS AND RACQUETBALL CENTERS, INCORPORATED**

COME NOW the Plaintiff, DeAnne L. Meador, and the Defendant, All American Fitness and Racquetball Centers, Incorporated, an Oklahoma corporation, and hereby stipulate that the action against this Defendant be dismissed with prejudice. Each party will bear their own fees and costs.

  
\_\_\_\_\_  
**DAVID HUMPHREYS, OBA #12346**  
**THE HUMPHREYS LAW FIRM**  
1602 S. Main Street, Suite A  
Tulsa, Oklahoma 74119-4455  
(918) 584-2244

(918) 584-2244

BEST, SHARP, HOLDEN, SHERIDAN,  
BEST & SULLIVAN

By: 

AMY E. KEMPFFERT, OBA #  
KAREN GRUNDY, OBA # 14198  
100 West Fifth Street  
Tulsa, Oklahoma 74103

**CERTIFICATE OF MAILING**

I, David Humphreys, hereby certify that on the 20th day of December, 1995, I mailed a true and correct copy of the above foregoing instrument with postage prepaid to:

Neal E. Stauffer  
Selman and Stauffer, Inc.  
700 Petroleum Club Building  
601 S. Boulder  
Tulsa, Oklahoma 74119

William H. Hinkle  
Hinkle, Zeringue & Smith  
320 S. Boston Ave., Suite 1100  
Tulsa, Oklahoma 74103-4700

T. Reid Young  
1611 S. Denver  
Tulsa, Oklahoma 74119

Rita J. Gassaway  
Pray, Walker, Jackman,  
Williamson & Marlar  
900 ONEOK Plaza  
100 W. 5th Street  
Tulsa, Oklahoma 74103-4218



**DAVID HUMPHREYS**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

DEANNE L. MEADOR, individually  
and on behalf of all others  
similarly situated,

Plaintiff,

vs.

RADER ADFAX, an unincorporated  
business association; CHRIS CAMPBELL,  
individually and d/b/a Rader Adfax;  
ALL AMERICAN FITNESS AND  
RACQUETBALL CENTERS,  
INCORPORATED, an Oklahoma  
Corporation; PARTIES PLUS, INC.,  
an Oklahoma corporation; MILLINDA'S  
GOLD MEDALLION,

Defendants.

**ENTERED ON DOCKET**

**DATE** 12-22-95

Case No.: 95-C-785H

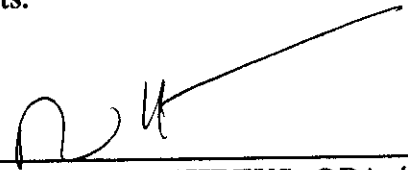
**FILED**

**DEC 21 1995**

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

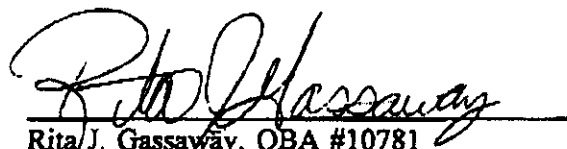
**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE  
OF ALL CLAIMS AGAINST DEFENDANT PARTIES PLUS, INC.**

COME NOW the Plaintiff, DeAnne L. Meador, and the Defendant, Parties Plus, Inc.,  
and hereby stipulate that the action against this Defendant be dismissed with prejudice.  
Each party will bear their own fees and costs.

  
\_\_\_\_\_  
**DAVID HUMPHREYS, OBA #12346**  
**THE HUMPHREYS LAW FIRM**  
1602 S. Main Street, Suite A  
Tulsa, Oklahoma 74119-4455  
(918) 584-2244

**SELMAN AND STAUFFER, INC.**

BY:



Rita J. Gassaway, OBA #10781

Terri S. Roberts, OBA #16299

PRAY, WALKER, JACKMAN,

WILLIAMSON & MARLAR

900 Oneok Plaza

100 West 5th Street

Tulsa, OK 74103-4218

**CERTIFICATE OF MAILING**

I, David Humphreys, hereby certify that on the 21st day of December, 1995, I mailed a true and correct copy of the above foregoing instrument with postage prepaid to:

Neal E. Stauffer, Esq.  
SELMAN AND STAUFFER, INC.  
700 Petroleum Club Building  
601 S. Boulder  
Tulsa, Oklahoma 74119

William H. Hinkle, Esq.  
HINKLE, ZERINGUE & SMITH  
320 S. Boston Ave., Ste. 1100  
Tulsa, Oklahoma 74103-4700

Amy E. Kempfert, Esq.  
BEST, SHARP, HOLDEN, SHERIDAN  
BEST & SULLIVAN  
100 W. 5th Street  
Tulsa, Oklahoma 74103

T. Reid Young, Esq.  
1611 S. Denver  
Tulsa, Oklahoma 74119

Rita J. Gassaway, Esq.  
Terri S. Roberts, Esq.  
PRAY, WALKER, JACKMAN,  
WILLIAMSON & MARLAR  
900 Oneok Plaza  
100 West 5th Street  
Tulsa, OK 74103-4218

---

DAVID HUMPHREYS

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

DEC 21 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

CAROL STANBERY, individually, and )  
as next friend of her minor )  
daughter, Melissa Stanbery nfr )  
Melissa Stanbery, )

Plaintiff(s), )

vs. )

Case No. 94-C-1195-B ✓

JAMES S. OHLSON, PRE-FAB TRANSIT )  
CO. and PROTECTIVE INSURANCE CO., )

ENTERED ON DOCKET

Defendant(s). )

DATE DEC 22 1995

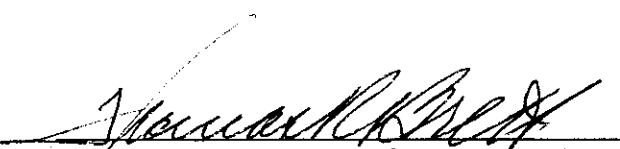
**JUDGMENT DISMISSING ACTION**  
**BY REASON OF SETTLEMENT**

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 21 day of December, 1995.

  
THOMAS R. BRETT, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
on behalf of the Small Business Administration and  
the Department of Housing and Urban Development,

Plaintiff,

vs.

MARY K. WESTMORELAND

aka Mary Kathy Westmoreland

fka Mary Kathy Hendricks;

THE UNKNOWN HEIRS, EXECUTORS,  
ADMINISTRATORS, DEVISEES,

TRUSTEES, SUCCESSORS AND

ASSIGNS OF BENNY WESTMORELAND

aka Benny Ross Westmoreland,

Deceased;

LLOYD ORAN PHILLIPS

aka Lloyd Owen Phillips aka Lloyd Oren Phillips

aka Lloyd O. Phillips;

BETTY LaVONNE TODD

fka Betty LaVonne Sharp fka Betty LaVonne Phillips

fka Betty L. Phillips;

LONGVIEW LAKE ASSOCIATION, INC.;

LEONA WILLIAMS;

STATE OF OKLAHOMA ex rel.

Oklahoma Tax Commission;

PUBLIC SERVICE COMPANY OF

OKLAHOMA;

CITY OF TULSA, Oklahoma;

COUNTY TREASURER, Tulsa County,

Oklahoma;

BOARD OF COUNTY COMMISSIONERS,

Tulsa County, Oklahoma;

NORMAN DELL TODD,

Defendants.

**FILED**

DEC 20 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE DEC 22 1995

CIVIL ACTION NO. 94-C-240-B

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 20th day of December, 1995, there comes on for  
hearing before the Magistrate Judge the Motion of the United States of America to confirm



the sale made by the United States Marshal for the Northern District of Oklahoma on October 25, 1995, pursuant to an Order of Sale dated August 30, 1995, of the following described property located in Tulsa County, Oklahoma:

**Lot Twenty-three (23), Block One (1), LONGVIEW LAKE ESTATES, BLOCKS 1 THRU 14 INCLUSIVE, an Addition in Tulsa County, State of Oklahoma, according to the recorded plat thereof.**

**LESS**

**A part of Lot 23, Block 1, of the Longview Lake Estates Addition to the City of Tulsa, Tulsa County, Oklahoma, more particularly described as follows: Beginning at the Southwest corner of said Lot 23; thence Easterly along the South line of said Lot 23 to a point which is 39.00 feet Southeasterly and radial to the centerline of Mingo Road; thence Northeasterly to the Northwest corner of said Lot 23; thence Southerly along the West line of said Lot 23 to the point of beginning, containing 835 feet more or less.**

Appearing for the United States of America is Cathryn D. McClanahan, Assistant United States Attorney. Notice was given the Defendant, Mary K. Westmoreland aka Mary Kathy Westmoreland fka Mary Kathy Hendricks, by mail; the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Benny Westmoreland aka Benny Ross Westmoreland, Deceased, by publication; the Defendant, Lloyd Oran Phillips aka Lloyd Owen Phillips aka Lloyd Oren Phillips aka Lloyd O. Phillips, by mail; the Defendant, Betty LaVonne Todd fka Betty LaVonne Sharp fka Betty LaVonne Phillips fka Betty L. Phillips, by mail; the Defendant, Longview Lake Association, Inc., through Sue Wright, Corporate Secretary, by mail; the Defendant, Leona Williams, through her attorney Gary J. Dean, by mail; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, through Kim D. Ashley, Assistant General Counsel, by mail; the Defendant, Public Service Company of Oklahoma, through

its attorney Daniel M. Webb, by mail; the Defendant, **City of Tulsa, Oklahoma**, through Russell R. Linker II, Assistant City Attorney, by mail; the Defendants, **County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma**, through Dick A. Blakeley, by mail; the Defendant, **Norman Dell Todd**, by mail; and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors or assigns, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors or assigns, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

**S/Frank H. McCarthy**

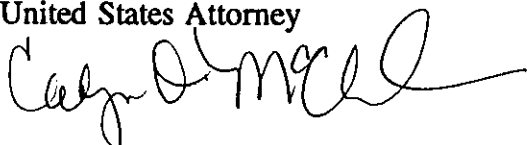
**U.S. Magistrate**

**UNITED STATES MAGISTRATE JUDGE**

**APPROVED AS TO FORM AND CONTENT:**

**STEPHEN C. LEWIS**

United States Attorney



**CATHRYN D. MCCLANAHAN, OBA #014853**

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463

**Report and Recommendation of United States Magistrate Judge  
Case No. 94-C-240-B (Westmoreland)**

CDM:css

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

ANNIE LEE RUSHING; UNKNOWN  
SPOUSE IF ANY OF ANNIE LEE  
RUSHING; CROSSLANDS FEDERAL  
SAVINGS BANK; COUNTY  
TREASURER, Tulsa County, Oklahoma;  
BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

**FILED**

DEC 20 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 95-C 88B

ENTERED ON DOCKET

DATE DEC 22 1995

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 20th day of December, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 23, 1995, pursuant to an Order of Sale dated August 9, 1995, of the following described property located in Tulsa County, Oklahoma:

Lot Thirty-two (32), Block Thirty-eight (38), VALLEY VIEW  
ACRES SECOND ADDITION to the City of Tulsa, Tulsa  
County, State of Oklahoma, according to the recorded Plat  
thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, ANNIE LEE RUSHING, CROSSLANDS FEDERAL SAVINGS BANK, and COUNTY TREASURER, Tulsa County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma through Dick A. Blakeley, Assistant District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

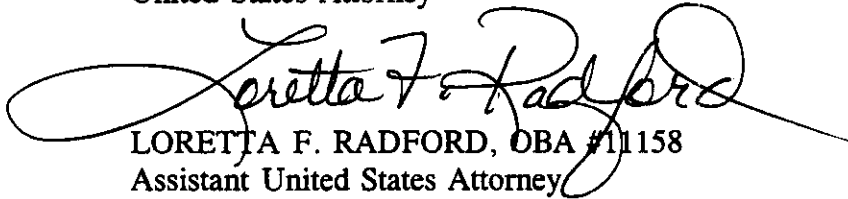
The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

**S/Frank H. McCarthy**  
**U.S. Magistrate**  
**UNITED STATES MAGISTRATE JUDGE**

APPROVED AS TO FORM AND CONTENT:  
STEPHEN C. LEWIS  
United States Attorney

A large, stylized handwritten signature in black ink, reading "Loretta F. Radford". The signature is written over the printed name and title of the signatory.

LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
333 W. 4th St., Ste. 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR/lg

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 88B

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES W. STRIEGEL aka James N.  
Striegel; UNKNOWN SPOUSE OF  
James W. Striegel aka James N. Striegel,  
if any; DONNA STRIEGEL aka Donna G.  
M. Striegel aka Donna M. Striegel;  
UNKNOWN SPOUSE OF Donna Striegel  
aka Donna G. M. Striegel aka Donna M.  
Striegel, if any; LOUIS E. STRIEGEL;  
MARGARET S. STRIEGEL; CENTURY  
XXI EAST, INC.; COUNTY  
TREASURER, Tulsa County, Oklahoma;  
BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

**FILED**

DEC 20 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 95-C 0110B

**ENTERED ON DOCKET**

DATE DEC 22 1995

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 20th day of December, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 25, 1995, pursuant to an Order of Sale dated August 9, 1995, of the following described property located in Tulsa County, Oklahoma:

**Lot Four (4), Block One (1), CENTURY 21 EAST to the  
City of Tulsa, County of Tulsa, State of Oklahoma,  
according to the Recorded Plat thereof.**

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, James W. Striegel, Cathy Striegel, Louis E. Striegel, Margaret S. Striegel, County Treasurer and Board of

County Commissioners, Tulsa County, Oklahoma, by mail, and to the Defendants, Donna Striegel aka Donna G.M. Striegel aka Donna M. Striegel, Unknown Spouse of Donna Striegel aka Donna G.M. Striegel aka Donna M. Striegel, if any, and Century XXI East, Inc., by Publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Charles Loveless, his being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Charles Loveless, good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

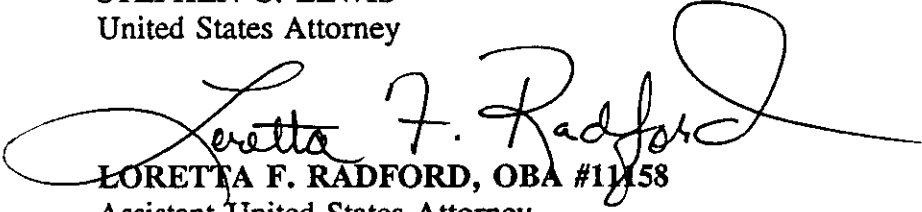
**S/Frank H. McCarthy**  
**U.S. Magistrate**

**UNITED STATES MAGISTRATE JUDGE**



APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 0110B

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JERRY THOMAS aka Jerry Joe Thomas  
aka Jerry J. Thomas; UNKNOWN  
SPOUSE OF Jerry Thomas aka Jerry Joe  
Thomas aka Jerry J. Thomas, if any;  
ZEDIA L. BUFORD fka Zedia Lavone  
Thomas fka Zedia L. Thomas;  
UNKNOWN SPOUSE OF Zedia L.  
Buford fka Zedia Lavone Thomas fka  
Zedia L. Thomas; STATE OF  
OKLAHOMA, ex rel. DEPARTMENT  
OF HUMAN SERVICES; COUNTY  
TREASURER, Tulsa County, Oklahoma;  
BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

**FILED**

DEC 20 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 95-C 0085 B

ENTERED ON DOCKET

DATE DEC 22 1995

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 20th day of December, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 11, 1995, pursuant to an Order of Sale dated July 24, 1995, of the following described property located in Tulsa County, Oklahoma:

Lot Nineteen (19), in Block Five (5), AMENDED PLAT OF  
VAN ACRES ADDITION, a Subdivision to the City of  
Tulsa, County of Tulsa, State of Oklahoma, according to the  
recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant  
United States Attorney. Notice was given the Defendants, Jerry Thomas aka Jerry Joe

Thomas aka Jerry J. Thomas, State of Oklahoma, ex rel. Oklahoma Tax Commission, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, by mail, and to the Defendants, Unknown Spouse of Jerry Thomas aka Jerry Joe Thomas aka Jerry J. Thomas, if any, Zedia L. Buford fka Zedia Lavone Thomas fka Zedia L. Thomas and Unknown Spouse of Zedia L. Buford fka Zedia Lavone Thomas, if any, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the

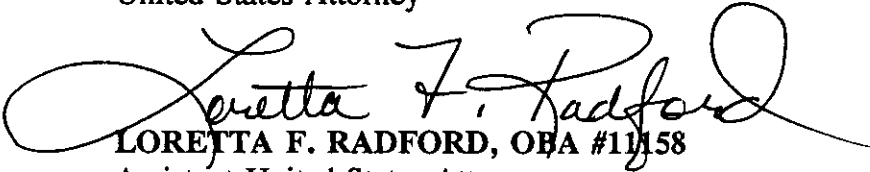
purchaser be granted possession of the property against any or all persons now in possession.

S/Frank H. McCarthy  
U.S. Magistrate

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

A large, stylized handwritten signature in black ink, reading "Loretta F. Radford".

LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 0085 B

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIE D. FRAZIER aka Willie Don  
Frazier; BRENDA A. FRAZIER;  
AMERICAN BANKERS INSURANCE  
CO., of Florida; WHITE BONDING CO.,  
aka White Bonding; STATE OF  
OKLAHOMA ex rel. OKLAHOMA TAX  
COMMISSION; COUNTY TREASURER,  
Tulsa County, Oklahoma; BOARD OF  
COUNTY COMMISSIONERS, Tulsa  
County, Oklahoma,

Defendants.

**FILED**

DEC 20 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 95-C-0021-B

ENTERED ON DOCKET  
DEC 22 1995  
DATE \_\_\_\_\_

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 20th day of December, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 11, 1995, pursuant to an Order of Sale dated August 1, 1995, of the following described property located in Tulsa County, Oklahoma:

**Lot Seventeen (17), Block Thirty nine (39), VALLEY VIEW  
ACRES SECOND ADDITION to the City of Tulsa, Tulsa  
County, State of Oklahoma, according to the recorded plat  
thereof.**

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Willie D. Frazier aka Willie Don Frazier, Brenda A. Frazier, American Bankers Insurance Co., of Florida, White Bonding Co., State of Oklahoma, ex rel. Oklahoma Tax Commission, County Treasurer

and Board of County Commissioners, Tulsa County, Oklahoma, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

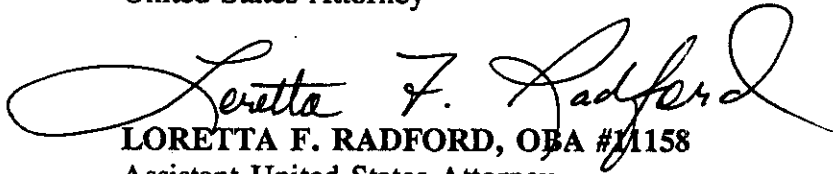
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

**S/Frank H. McCarthy**  
**U.S. Magistrate**  
**UNITED STATES MAGISTRATE JUDGE**

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

A handwritten signature in cursive script, reading "Loretta F. Radford". The signature is written in black ink and is positioned above the printed name and title of the signatory.

**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C-0021-B

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SANDRA P. FLEETWOOD; SERVICE  
COLLECTION ASSOCIATION, INC;  
COUNTY TREASURER, Tulsa County,  
Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

**FILED**

DEC 20 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE DEC 22 1995

Civil Case No. 95 C 365B

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 20th day of December, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 23, 1995, pursuant to an Order of Sale dated August 9, 1995, of the following described property located in Tulsa County, Oklahoma:

**Lot Eight (8), Block Nine (9), RIVERVIEW PARK SECOND  
ADDITION, Blocks 5 through 12, an Addition to the City of  
Tulsa, Tulsa County, State of Oklahoma, according to the  
recorded plat thereof.**

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Service Collection Association, Inc., County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, by mail, and to the Defendant, Sandra P. Fleetwood, by Publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.



The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

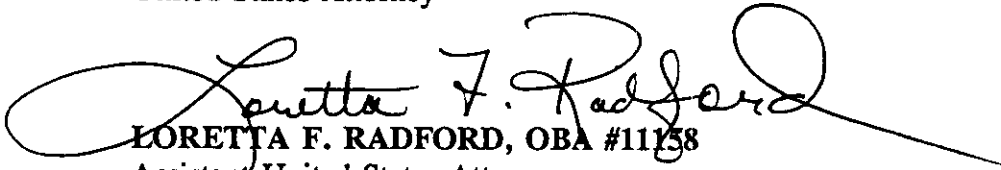
**S/Frank H. McCarthy**  
**U.S. Magistrate**

---

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

A large, stylized handwritten signature in black ink, reading "Loretta F. Radford". The signature is written over the printed name and extends to the right.

LORETTA F. RADFORD, OBA #11138

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95 C 365B

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

H. PHILLIP THOMPSON aka PHIL  
THOMPSON; PAULA THOMPSON;  
SERVICE COLLECTION  
ASSOCIATION, INC.; BANK OF  
OKLAHOMA, NA; COUNTY  
TREASURER, Tulsa County, Oklahoma;  
BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

**FILED**

DEC 20 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 95-C 208B

ENTERED ON DOCKET

DATE DEC 22 1995

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 20th day of December, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 10, 1995, pursuant to an Order of Sale dated July 13, 1995, of the following described property located in Tulsa County, Oklahoma:

Lot Eighteen (18), Block Thirty-nine (39), A  
RESUBDIVISION OF BLOCKS 32, 33, 34 & 39 OF  
CHIMNEY HILLS SOUTH BLOCKS 32 THRU 39, an  
Addition to the City of Tulsa, Tulsa County, State of  
Oklahoma, according to the recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, H. PHILLIP THOMPSON aka PHIL THOMPSON, PAULA THOMPSON, SERVICE COLLECTION ASSOCIATION,

INC. through its attorney Daniel M. Webb, BANK OF OKLAHOMA, NA through its attorney E.J. Raymond, and COUNTY TREASURER, Tulsa County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, and to the purchaser, Susan Khoury, Inc., by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Susan Khoury, Inc., it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

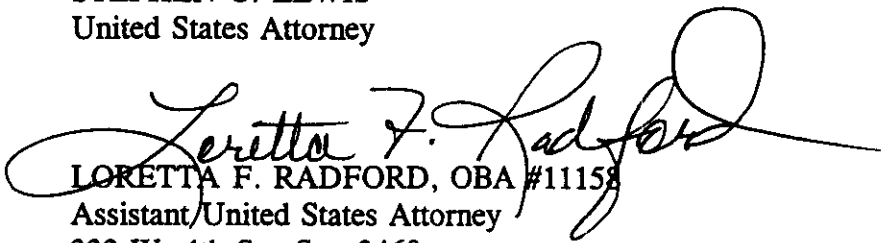
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Susan Khoury, Inc., a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/Frank H. McCarthy  
U.S. Magistrate  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



LORETTA F. RADFORD, OBA #11158  
Assistant/United States Attorney  
333 W. 4th St., Ste. 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR/lg

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 208B

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

SUSAN EDMONDS, MARY HOLYCROSS, )  
CAROL GRAHAM, and CRISTOPHER CARR, )  
Individually and on behalf of all others )  
similarly situated, )

Plaintiffs, )

v. )

SOUTHWESTERN BELL TELEPHONE )  
COMPANY, a Missouri corporation, and )  
SOUTHWESTERN BELL TELEPHONE )  
COMPANY OF OKLAHOMA, an Oklahoma )  
corporation, )

Defendants. )

ENTERED ON DOCKET

DATE DEC 22 1995

No. 95-C-775-K

**FILED**

DEC 21 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT

**ORDER**

On joint motion of all parties, this case is hereby dismissed without prejudice on condition that the refiling of this case, if any, is limited to the United States District Court for the Western District of Oklahoma.

/s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HARRON JAMES EDWARDS,  
Petitioner,  
vs.  
RITA MAXWELL, et al.,  
Respondent.

No. 95-C-927-K

ENTERED ON DOCKET  
DATE DEC 22 1995

FILED

DEC 21 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT

ORDER

Before the Court is Petitioner's notice of appeal filed on December 18, 1995. Petitioner desires to appeal the decision and order of this Court denying his petition for a writ of habeas corpus, filed on November 30, 1995. Petitioner is proceeding in forma pauperis.

28 U.S.C. § 2253 requires a petitioner to obtain a certificate of probable cause before appealing a final order in a habeas corpus proceeding under 28 U.S.C. § 2254. To receive a certificate of probable cause, a petitioner must "make a 'substantial showing of the denial of [a] federal right.'" Lozada v. Deeds, 498 U.S. 430, 431 (1991) (per curiam) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)). A petitioner can satisfy this standard by demonstrating that the issues raised are debatable among jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings. Barefoot, 463 U.S. at 893. The Tenth Circuit applies the same standard. See Gallagher v. Hannigan, 24 F.3d 68 (10th Cir. 1994); Stevenson v. Thornburgh, 943 F.2d 1214, 1216 (10th Cir. 1991).

7

After carefully considering the record in this case, the Court concludes that a certificate of probable cause should not issue in this case because Petitioner has not made a substantial showing that he was denied a federal right. The record is devoid of any authority demonstrating that the Tenth Circuit Court of Appeals could resolve the issue differently.

Accordingly, Petitioner's request for a certificate of probable cause (docket #6) is **denied**. See Fed. R. App. P. 22(b).

SO ORDERED THIS 20 day of December, 1995.

  
TERRY C. KEEN  
UNITED STATES DISTRICT JUDGE



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHNNY RAY LAMBERT,  
Petitioner,  
vs.  
RON WARD,  
Respondent.

No. 95-C-1023-K

ENTERED ON DOCKET  
DATE DEC 22 1995

FILED

DEC 21 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT

ORDER

On November 30, 1995, the Court informed Petitioner that it would dismiss this action within fifteen days for failure to submit the \$5.00 filing fee. Petitioner has not responded.

Accordingly, this action is hereby DISMISSED WITHOUT PREJUDICE for failure to pay the filing fee. The Clerk shall MAIL to Petitioner a copy of his petition for a writ of habeas corpus.

SO ORDERED THIS 20 day of December, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KEVIN FOX,

Plaintiff,

vs.

PERFECTION MACHINERY SALES,  
INC., an Illinois corporation )  
and MET-COIL--R.W.C., INC., )  
an Illinois corporation. )

Defendants. )

No. 95-C-459-K ✓

ENTERED ON DOCKET

DATE ~~DEC 22 1995~~

**FILED**

DEC 21 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT

ORDER

Upon joint application of the parties, this action is hereby  
dismissed with prejudice, each side bearing its own costs.

ORDERED this 21 day of December, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

5

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 20 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

OKLAHOMA EMPLOYMENT SECURITY  
COMMISSION,

Appellant

vs.

OKLAHOMA FURNITURE MART, INC.,  
EID # 73-1397945, AND FURNITURE  
SHOWPLACE, INC., EID # 73-1203153,  
Oklahoma Corporation,  
Consolidated Debtors, et al.,

Appellees.

Case No. 95-C-688-B

Bk. Case No. 93-011902-C

Chapter 11

ENTERED ON DOCKET

DATE DEC 21 1995

ORDER OF DISMISSAL

Upon the Voluntary Dismissal of this Appeal by the Appellant, Oklahoma Employment  
Security Commission, it is:

**ORDERED, ADJUDGED, AND DECREED** that this appeal be dismissed.

S/ THOMAS R. BRETT

Thomas R. Brett  
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 20 1995

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

THOMAS J. GUNN,

Plaintiff,

-vs-

MARY G. FOX, AMERICAN STANDARD  
INSURANCE COMPANY OF WISCONSIN,  
AMERICAN FAMILY MUTUAL  
INSURANCE COMPANY and DAIRYLAND  
INSURANCE COMPANY,

Defendants.

No. 94-C-1114-B

ENTERED ON FILE

DATE DEC 21 1995

ORDER OF DISMISSAL WITH PREJUDICE

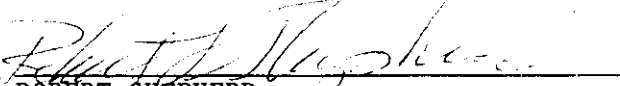
NOW on this 19<sup>th</sup> day of December, 1995,

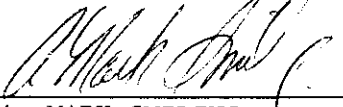
Plaintiff's Application to Dismiss with Prejudice came on for hearing. The Court being fully advised in the premises finds that said Application should be sustained and the Defendants, should be dismissed from the above entitled action with prejudice.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiff's Application to Dismiss With Prejudice be sustained and the above captioned action be dismissed with prejudice as to Defendants.

  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

  
ROBERT SHEPHERD  
JAMES E. WALLACE  
ATTORNEYS FOR PLAINTIFF

  
A. MARK SMILING  
ATTORNEY FOR DEFENDANT  
MARY G. FOX

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GLENN ANDREW PRATER,

Plaintiff,

vs.

ST. CECILIA CATHOLIC CHURCH,  
CATHOLIC DIOCESE OF TULSA,  
and MORRIS DALE VANDERFORD,

Defendants.

CASE NO. 95-C-961-B

ENTERED ON DOCKET  
DATE DEC 21 1995

**FILED**

DEC 20 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

O R D E R

This matter comes on for consideration of Plaintiff's Motion To Remand. (docket # 9)

Plaintiff filed this action<sup>1</sup> in Rogers County District Court alleging that approximately seven years ago Morris Dale Vanderford, then a Deacon in St. Cecilia Catholic Church, Claremore, Oklahoma, repeatedly sexually battered Plaintiff, then 12 years of age, while Plaintiff attended St. Cecilia Catholic Church. Plaintiff also alleges a claim of intentional infliction of emotional distress against Vanderford, and alleges claims of negligence against Defendants St. Cecilia Catholic Church and Catholic Diocese of Tulsa. Plaintiff seeks actual and punitive damages.

Defendant Catholic Diocese of (Diocese) Tulsa removed this case to this Court, averring that because Plaintiff alleged in the state court pleading that he was a resident of California,

---

<sup>1</sup> Earlier, Plaintiff filed an action in this Court based essentially on these same claims, being Case No. 94-C-381-K, which case was dismissed without prejudice by joint stipulation of the parties on October 31, 1994.

diversity exists because this is a matter between citizens of different states. Diocese fails to state, however, that it is an Oklahoma citizen for the purposes of diversity jurisdiction and, in fact, fails to state any diversity citizenship.<sup>2</sup>

There appears to be considerable conflict whether Plaintiff is, in actuality, a California resident for purposes of diversity citizenship (as he alleged in both cases) or whether he is an Oklahoma citizen. This controversy does not move the ball in any direction because the critical inquiry herein is what is the citizenship of the defendants.

Plaintiff argues, and the Court agrees, that 28 U.S.C. §1441(b) prevents Oklahoma citizens properly joined and served as Defendants from removing an action to federal court based upon diversity jurisdiction. That provision states:

"(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

Case law supports this clear edict of removal procedure. Brooks v. District of Columbia, 819 F.Supp. 67 (D.D.C.1993); Hudler v. Wilson, 376 F.Supp. 592 (D.C. Colo.1974); Day v. Avery, 548 F.2d 1018, 179 U.S.App.D.C. 63, certiorari denied 97 S.Ct. 1706, 431

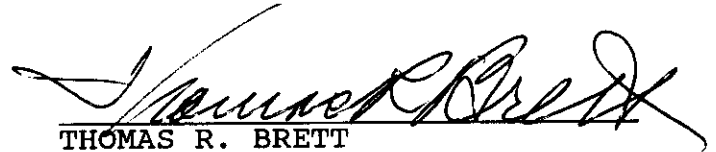
---

<sup>2</sup> In the earlier case, 94-C-381-K, Plaintiff alleged he was a citizen of California. Diocese acknowledged in that case that this Court had subject matter jurisdiction over it which eliminated, of course, that Diocese was a California citizen. From the tenor of the pleadings it appears that Diocese is an Oklahoma entity although careful wording in pleadings of both cases appears to keep this point obscure.

U.S. 908, 52 L.Ed.2d 394. See other cases cited under 28 U.S.C.A. §1441, n.417. The subject action, the removal being based upon alleged diversity jurisdiction, is not one involving original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States.

The Court concludes this matter should be and the same is hereby REMANDED to the District Court for Rogers County, Oklahoma.

IT IS SO ORDERED this 20 day of December, 1995.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 20 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

JOE ALLEN JOHNSON,  
Petitioner,  
vs.  
LARRY FIELDS,  
Respondent.

No. 93-C-312-B

ENTERED ON DOCKET

DATE DEC 21 1995

ORDER

This matter comes before the Court on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Washington Department of Corrections, challenges his 1962 First Degree Murder conviction in Tulsa County District Court, Case No. 19,485. Also before the Court is Petitioner's request for an evidentiary hearing. As more fully set out below, the Court concludes that Petitioner's application should be denied.

**I. BACKGROUND**

On April 26, 1962, while Petitioner and Danny McGinnis attempted to gain entrance at the Safeway Store at 1706 South Boston, Tulsa, Oklahoma, they were interrupted by a police car. Petitioner fled down an alley and entered the back porch of J. B. Hillenburg, 1725 South Baltimore, and hid in a half bathroom just off the back porch. Ms. Hillenburg observed Petitioner on the back porch and related the information to her husband who in turn informed Officers Hugh Greer and Ray Burch. The Officers went to the back porch and attempted to open the door. When the door bounced back, they identified themselves as officer and ordered

(17)



Petitioner out. Receiving no response, Officer Greer forcefully brought Petitioner out and searched for weapons. When Officer Burch attempted to place handcuffs on him, a fight ensued. Due to the close confines of the back porch, the Officers pushed Petitioner outside the door in the backyard. As the Officers exited Petitioner seized Greer's gun, aimed it at the Officers, and announced his intention to shoot them. Burch immediately fired his gun, but was struck in the face by a bullet from the gun fired by Petitioner. Burch fired a second time, and then fall to the ground near Greer. Petitioner then fired a few more shots.

During an autopsy of Greer's body, two bullets were removed. The non-fatal bullet removed from Greer's body was identified at trial as having been fired from Greer's gun. The bullet identified as the one producing Greer's death, was so mutilated that it could not be identified.

On October 11, 1962, Petitioner was convicted by a jury of murder in the first degree. On October 24, 1962, the court sentenced Petitioner in accordance with the jury's verdict to a term of life in the custody of the Oklahoma Department of Corrections. The Oklahoma Court of Criminal Appeals affirmed the conviction on direct appeal. Johnson v. State, 386 P.2d 336 (Okla. Crim. App. 1963). In January 1992, Petitioner, represented by retained counsel, filed an application for post-conviction relief, alleging ineffective assistance of counsel and insufficiency of the evidence. The Tulsa County District Court denied relief and the Court of Criminal Appeals affirmed.

## II. ANALYSIS

Respondent concedes, and this Court finds, that Petitioner meets the exhaustion requirements under the law. The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992).

### A. Ineffective Assistance of Counsel

First the Court addresses Petitioner's ineffective-assistance-of-counsel claim. Petitioner alleges his trial counsel (1) failed to move to quash the information on the basis of a variance between the pre-meditated murder charged in the information and the felony murder proven at trial; (2) failed to procure medical records necessary to suppress admissions against interest; and (3) failed to develop adequately a misdemeanor manslaughter theory.

Under Strickland v. Washington, 466 U.S. 668, 687 (1984), a habeas petitioner must satisfy a two-part test to establish ineffective assistance of counsel. First, he must show that his attorney's performance "fell below an objective standard of reasonableness," id. at 688, and second, he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, id. at 694; see also Lockhart v. Fretwell, ~~506 U.S. 564~~ 113 S.Ct. 838, 842-43 (1993) (emphasizing that prejudice also requires that errors produced unfair or unreliable trial). This Court's review of counsel's performance must be highly

deferential:

It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstance, the challenged action might be considered sound trial strategy. There are countless ways to provide effective assistance in any given case.

Strickland, 466 U.S. at 689 (citations and quotation omitted).

After reviewing the entire record, including the trial transcript, the Court is of the opinion that Petitioner's ineffective assistance claim is without merit. Petitioner cannot sustain his burden of proving that the conduct of his defense counsel fell below an objective standard of reasonableness. Moreover, since none of Petitioner's claims has any merit, Petitioner cannot establish that he was prejudiced by counsel's conduct. In the alternative, Petitioner's ineffective assistance claim should be dismissed under Rule 9(a) of the Rules Governing Section 2254 Cases. The thirty-year delay in raising these claims has clearly prejudiced the state's ability to present evidence of counsel's conduct as he passed away more than nine years ago. See Mansfield v. Champion, 992 F.2d 1098, 1104-05 (10th Cir. 1993); Bowen v. Murphy, 698 F.2d 381, 383 (1983).

1. Variance

In his first ground, Petitioner contends that counsel failed to move to quash the information on the basis of a variance between the pre-meditated murder charged in the information and the felony murder proven at trial. The information charged Petitioner with

unlawfully, willfully, maliciously, intentionally and feloniously, without authority of law and with a pre-meditated design upon the part of said defendant to effect the death of one Hugh Greer by shooting and discharging into the body of the said Hugh Greer certain revolver or pistol, loaded with gun powder and leaden or metal bullets.

As an alternative to premeditated murder, Instructions Nos. 4 and 11 submitted to the jury a felony murder theory--i.e, that Petitioner murdered Greer in the perpetration of a burglary. The gist of Petitioner's argument is that submission of Instruction Nos. 4 and 11 to the jury violated his due process right to be tried only on the offense charged in the indictment.

An unconstitutional amendment of the indictment occurs when the charging terms are altered, either literally or constructively, such as when the trial judge instructs the jury. Hunter v. State of New Mexico, 916 F.2d 595, 598 (10th Cir. 1990), cert. denied, 500 U.S. 909 (1991). In contrast, a variance occurs when the charging terms are unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment. Id. at 597. It is important to note the distinction between a constructive amendment of the indictment which is per se reversible error and a variance between the indictment and proof, which does not compel reversal of the conviction and triggers

harmless error analysis. Id. at 598.

In the instant case, the variance at trial neither amounted to a constructive amendment of the information nor caused Petitioner any prejudice. At the time of Petitioner's trial, the Oklahoma murder statute included pre-meditated as well as felony murder. See 21 O.S. 1951, § 701 and 707 (repealed in 1973);<sup>1</sup> see also McDonald v. Champion, 962 F.2d 1455, 1460 (10th Cir.), cert. denied, 113 S.Ct. 256 (1992); Sanders/Miller v. Logan, 710 F.2d 645, 649-650 (10th Cir. 1983). Therefore, the Court cannot say that the felony-murder charge altered the indictment or that the proof at trial broadened the basis of the conviction. Accordingly, counsel was not ineffective for failing to quash the information.

## 2. Incriminating Admissions

In his second ground, Petitioner contends counsel was ineffective for failing to exercise due diligence in securing Petitioner's medical records and appropriate medical "state of

---

<sup>1</sup> From 1951 through 1973, the murder statute read as follows:

§ 701. **Murder Defined.**--Homicide is murder in the following cases.

1. When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being.

3. When perpetrated without any design to effect death by a person engaged in the commission of any felony

§ 707. **Punishment of murder--Discretion of jury--Verdict--Plea of Guilty.**-- Every person convicted of murder shall suffer death, or imprisonment at hard labor in the State penitentiary for life, at the discretion of the jury. . . .

mind" testimony prior to the time of trial. He contends counsel should have presented those medical records to show that Petitioner's admissions against interest were involuntary as he was hospitalized and heavily medicated.

Petitioner made the first two admissions prior to being transported to the hospital. Subsequent to the confrontation with the police officers, Petitioner told Edwin B. Jones, a Tulsa Auxiliary Police Officer, that he "had just killed two cops." (Tr. at 149.) A few minutes later, while waiting for the ambulance, Petitioner told Charley Jones, a Tulsa Police Officer, that "I just shot two cops, they are worse than I." (Tr. at 218-19.)

Since an inference of guilt may be drawn from the above declarations, they constitute admissions against interest. Born v. State, 397 P.2d 924 (Okla. Crim. App. 1964), cert. denied, 379 U.S. 1000 (1965), overruled on other grounds, Brookins v. State, 602 P.2d 215 (Okla. Crim. App. 1979). Petitioner was neither hospitalized nor medicated at the time he made these admissions. Moreover, the statements were volunteered and not the product of any interrogation by the police. Consequently, the first two statements were properly admitted as original evidence and counsel was not ineffective for failing to procure medical records.

Petitioner made the third and fourth admission at the hospital. He told Officers Ed Underhill and Laude Davis at 10 a.m. the morning after the shooting that "I shot that man last night, I know I am going to burn." (Tr. at 336.) On May 1, 1995, five days after the shooting, Petitioner made his last admission to Officer

Bill Harp who asked him if he would tell his side of the story.  
(Tr. at 265-277.)

While there is evidence Petitioner was medicated during his hospitalization, he has failed to provide specific evidence to show that this medication rendered him incapable of understanding what he was doing when he uttered the statements at issue. In fact, Petitioner's lucid answers to the Officers' questions suggest he was quite cognizant of what was happening. Therefore, Petitioner's statements, as provided through Officers Underhill and Harp's testimony, were properly admitted as admissions against interest and counsel's failure to obtain the medical records in a timely manner did not amount to ineffective assistance of counsel.

To the extent Petitioner argues the time constraints rendered counsel's assistance ineffective under the Sixth Amendment, the Court concludes that Petitioner has not established prejudice as a result of the inadequate time for preparation. See United States v. Larouche, 896 F.2d 815, 825 (4th Cir.), cert. denied, 496 U.S. 927 (1990) (defendant who alleges that trial counsel's assistance was ineffective because of inadequate time to prepare for trial must identify specific prejudice which results from lack of time for preparation).

### 3. Jury Instructions

In his third ground, Petitioner contends that counsel did not develop adequately a misdemeanor manslaughter theory, thus leaving the jury with the option of acquittal or first degree murder. Even

assuming counsel's conduct fell below an objective standard of reasonableness, the Court finds that Petitioner was not prejudiced. Petitioner has not presented any evidence which would contradict the testimony of Officer Ray Burch or indicate the presence of mitigating circumstances that would necessitate the giving of manslaughter instructions to the jury.

#### **B. Sufficiency of the Evidence**

Petitioner's sufficiency of the evidence claim is controlled by the analysis set forth in Jackson v. Virginia, 443 U.S. 307, 318-19 (1979). Sufficient evidence exists to support a conviction if any rational trier would accept the evidence as establishing each essential elements of the crime beyond a reasonable doubt. Id. at 319. In reviewing a sufficiency claim, the Court must not weigh conflicting evidence or consider witness credibility. United States v. Davis, 965 F.2d 804, 811 (10th Cir. 1992), cert. denied, 113 S.Ct. 1255 (1993). Instead the Court must view the evidence in the light most favorable to the prosecution, Jackson, 443 U.S. at 319, and "accept the jury's resolution of the evidence as long as it is within the bounds of reason." Grubbs v. Hannigan, 982 F.2d 1483, 1487 (10th Cir. 1993).

Based on the evidence presented at trial, the Court concludes that a reasonable juror could have found the evidence sufficient to show that Petitioner committed the crime of first degree murder. None of the evidence presented at trial contradicted the testimony of Officer Ray Burch, the only witness to the slaying.



### III. CONCLUSION

After carefully reviewing the record in this case, the Court finds Petitioner is not in custody in violation of the Constitution or laws of the United States. Accordingly, the petition for a writ of habeas corpus is hereby DENIED.

SO ORDERED THIS 18 day of dec, 1995.

A handwritten signature in cursive script, reading "Thomas R. Brett".

THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE